

NORTH DAKOTA DEFENDER

The Newsletter of the North Dakota Commission on Legal Counsel for Indigents

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Fourteenth Edition

The Commission

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Upcoming Meetings and Events

December 9, 2010 - Commission Meeting
Valley City

December 10, 2010 - LSND Christmas CLE
Seven Seas, Mandan

February 28-March 1, 2011 - Defense Boot Camp
Radisson, Bismarck

June 23-24, 2011 - Indigent Defense Seminar
Hilton Garden Inn, Fargo

2010 Indigent Defense Seminar

The 2010 Indigent Defense Summer CLE was held on June 23-24 at the Alerus Center, in Grand Forks. Approximately 70 attorneys and paralegals attended the seminar. The seminar was approved for 11.25 CLE credits in ND, including 2.0 ethics credits. It was also approved for 10.5 hours of MN CLE credit (event code 146986).

Mark Lanterman discussed cybercrime, and what you can find on that computer.



Many attorneys sought out Mr. Lanterman after his presentation for further discussion

You can't be assured that programs to delete information will actually do so; the only sure thing to do is to destroy the hard drive. We also learned about all the information that a person can get off of a smart phone. He has some thought provoking examples of how forensic evidence can serve as proof.

Bruce Quick and **Mark Friese** again gave a valuable criminal law update. Thank you to both of them for doing this on a yearly basis. And yes, we did hear your comments, and will make sure to give them more time on the schedule next year.

Joel Larson and **Blake Hankey** spoke on the topic of competency to stand trial. It was very interesting to hear about the trial and appellate sides of the same case. Kudos to Joel and Blake for taking on a difficult case.

Lori Conroy discussed sex offender registration requirements, and the immigration consequences of criminal convictions. We learned what Padilla will require, and there was much discussion about what it may require of defense attorneys.

Linda Catalano from LSND's Immigration Law Project lead a panel discussion about representing clients from diverse cultures. Thank you to Sivisa Milovanovic and Darci Asche for your insights on dealing with cultural and communication issues with foreign-born clients.

Monty Mertz gave an excellent primer on the use of interpreters and gave out some practical information for attorneys needing these services.

Gordon Dexheimer provided appellate training. He showed us (and had us participate) building a theory of defense by brainstorming to develop the facts of the case. You can win that appeal by developing a different factual narrative from that used by the prosecution.

Mike Hoffman spoke on eyewitness identification. We learned how suspect such identification can be; and how the level of certainty demonstrated by the witness bears little relationship to the accuracy of the identification.

Jennifer Thompson gave a compelling talk about her ordeal as the victim of a brutal rape, and her misidentification of Ronald Cotton as her rapist. Mr. Cotton had insisted she was mistaken, but Ms. Thompson positive identification was the compelling evidence that put him behind bars.



Jennifer Thompson

Thank you to all who attended. Special thanks to SBAND and **Jeanne Schlittenhard** and **Carrie Molander** for all of their help in providing this training.

Training in Wyoming

The Commission sends two attorneys to the Western Trial Advocacy Skills Training in Laramie, Wyoming, each June. This year Eric Baumann from the Minot office, and Dan Borgen from the Grand Forks office attended the training. Eric has the following to say about it:

Dan Borgen and I attended the Western Trial Advocacy Institute this year in Laramie Wyoming. We stayed at the University of Wyoming dorms, and it felt a little bit like being back in college. The program called upon the participants to do exercises to improve their trial skills, so it required more active participation than a standard CLE program. The faculty was filled with renowned attorneys from around the country who showed participants how to present their case to a jury in a dynamic fashion. The program was structured in a manner to get the participants to interact, and what I really enjoyed about the experience was the opportunity to meet attorneys from around the country.

-Eric Baumann

Boot Camp for Defenders

There will be a trial "boot camp" for attorneys interested in taking on indigent defense cases on February 28 and March 1, 2011, in Bismarck. Please keep this date in mind for younger lawyers who would like to "test the waters" in trial work. More details will follow from the State Bar.

Odyssey Training

The Court System's new Odyssey® Case Management System is expected to be deployed in all ND counties by June 2011. Electronic filing is part of the system. Information about registration for the system and training on it can be found on the North Dakota Supreme Court website at: <http://www.ndcourts.com/court/news/efile916.htm>

Welcome Aboard

Erica Shively has been hired as a Public Defender in the Bismarck-Mandan office. Erica was born and raised in the Rugby, ND area. She received her undergraduate degree in Communication from the



Erica Shively

University of North Dakota in 2003. Following college, she worked for U.S. Congressman Earl Pomeroy in Washington, D.C. and on his 2004 reelection campaign. She returned to North Dakota and UND in 2005 to attend law school. During her legal education, Erica was active in many student groups including UND's Moot Court. She also wrote for law review and was published in the North Dakota Law Review. Erica graduated from law school with distinction in 2008 and was sworn into the bar later that year. After running a campaign for Jasper Schneider, Insurance Commissioner candidate, she was hired as an attorney by the Bismarck Regional Child Support Enforcement Unit. Erica started with the Bismarck Mandan Public Defender's Office in mid September.

Active in the community, Erica serves as the Athletic Director and a coach for Area 10 Special Olympics. She is also the President of the Northern Plains Dance Board, President Elect of the Young Lawyers Section of the State Bar of North Dakota, and a member of the Special Olympics and State Bar of North Dakota Editorial Boards. In her free time she enjoys reading, traveling, and spending time with her family and friends.

Jody Schnaidt is the new Office Assistant in the Valley City office. **Sarah Finstad** has been interning in the Grand Forks Public Defender office. **Caitlin Friedt** has joined the Dickinson Public Defender office as a part-time secretary.

Commission Appointments

Commissioners **W. Jeremy Davis** and **Jonal Uglem** were reappointed to the Commission by Chief Justice VandeWalle. Commissioner Davis was also elected by his fellow Commissioners to be the Commission chair during the upcoming year.

Representative **Duane DeKrey** was reappointed to the Commission by Representative Al Carlson, Chair of the Legislative Council.

FEATURED CONTRACTOR

... Ashley Holmes

This month's featured contractor is Ashley Holmes, a litigator hailing from Dickinson, North Dakota. Ashley was raised in the small mining town of Butte, Montana where she was a voracious athlete and a solid B student. She remembers law as being



Ashley Holmes

"in the back of my mind from the time I took part in a 6th grade mock trial of *Goldilocks Goes to Court*. I played a very upset and disgruntled momma bear but was really just disgruntled because I didn't get the part of an attorney."

However, Ashley spent the first half of her undergraduate tenure at Montana State University in Billings in various degree programs and playing softball. She couldn't commit to a law career unless she was sure it was the right choice. Then one summer, Ashley's brother had a position open on one of his wild land engine crews, so she signed on and took the training. The summer was spent in remote rugged terrain, carrying a 45 pound pack and dragging hand lines over rough, steep terrain; fighting fatigue, smoke, and fear. Her brother told her the most important thing to remember was that if he said run, RUN! And her first day out that is exactly what happened. When he gave the order, she covered a half mile in record time.

That summer and the following one, fighting fires served as proof to Ashley that she had what it

takes to achieve her goals. She returned to school, focusing on her future in the legal field and graduated in 2005 with a degree in History. She spent her first year of law school at Willamette University in Salem, Oregon. She loved Oregon: the beach, the mountains, and especially the climate. But tuition was high and she missed her family, so she transferred to UND for her second and third years. Ashley's brother was the Director of Safety for the university and his wife was starting her second year of med school. Ashley's first course of action upon arrival at UND was to join the malpractice football team and "kick some med school butt, including my sister-in-law." Her commitment to practicing law had only one caveat, "I started law school knowing only one thing for sure; I did not want to be a litigation attorney. Transactional work seemed like a better fit."

At UND, Ashley appreciated the opportunity to learn from practicing attorneys, rather than career legal professors. "I felt that the atmosphere and learning environment at UND was much better suited to train someone to actually practice law." During her second year, Ashley began clerking for Reichert Armstrong, a general practice firm focusing on criminal defense. This was the beginning of the road to becoming predominantly a criminal defense attorney.

After a semester of working with Reichert Armstrong, still firmly convinced she did not want to do litigation but not actually knowing what to do, Ashley applied for and was accepted to the Air Force Judge Advocate General 3rd year law program. During her 3rd year of law school, she was to be trained to enter JAG after graduating law school. "This seemed like a fitting option since I had yet to find a direction for my future career. The JAG program would give me a lot of options and experience to help guide my decision." However, it wasn't meant to be. Ashley was medically disqualified from the JAG program because of childhood Asthma. It was an ironic twist of fate for the consummate athlete.

Ashley's clerking duties during this period had been primarily for Kelly Armstrong out of the Dickinson office. After her disqualification from JAG, Kelly jokingly said "Why don't you work for

me?" It turned out that he wasn't joking. From that point on, Ashley focused primarily on his cases, including arguing one of his DUI administrative appeals at the North Dakota Supreme Court as a third year practicing attorney. "This experience was the first time I felt the adrenaline rush that comes with arguing my case. Although I was summarily affirmed on my first attempt before the bench, I began to feel like I was meant to argue."

After graduation and passing the bar in Montana and North Dakota, Ashley began working in the Dickinson Office as Kelly Armstrong's associate. "Kelly has served as a great mentor for me. I have been privileged to experience things in my first two years as an attorney that some young lawyers wouldn't see after five." To build her practice and help gain experience, Kelly suggested that Ashley take on a contract with the North Dakota Indigent Defense Counsel. "Since my first day as a licensed attorney, I have been accepting appointments in counties from Williams to Golden Valley to Bowman and beyond. Taking indigent appointments has not only garnered me some great experiences that I would have never gotten in my private practice, it also has given me a true sense of accomplishment and a feeling that the work I am doing is actually helping better peoples' lives.

Today, Ashley is enthusiastically pursuing her career as a criminal defense attorney. She coaches high school softball and plays recreational sports. Recently, she purchased her first home.

Poverty Guidelines

The Federal Poverty Guidelines for 2010 came out in August. They are the same as in 2009; accordingly, the Commission's Income Guidelines for 2010 remain the same as in 2009. The guidelines can be found on the Commission's website at <http://www.nd.gov/indigents/docs/incomeGuidelines2010.pdf>.

Presumed Rates of Reimbursement

The recoupment statutes were revised during the past legislative session. Under NDCC §§ 12.1-32-08 (4), 27-20-49 (4), and 29-07-01.1 (2), the Commission sets presumed rates of reimbursement of attorney fees and costs. Unless the court determines that there is no likelihood that the party is or will be able to pay attorney fees, the court is to order the party to reimburse the presumed amount of indigent defense costs and expenses. If the party requests a hearing within 30 days, the court is to schedule a hearing at which the actual amount of attorney fees and expenses must be shown. The presumed rates can be found on the Commission's website at: <http://www.nd.gov/indigents/docs/presumed-rate-at-torney.pdf>.

Update on Standards and Policies

During its June meeting, the Commission adopted an ADA notice and grievance procedure. Both can be found on the Commission's website at <http://www.nd.gov/indigents/standards/>.

During its September meeting, the Commission adopted a modified Standard Regarding Case Assignment Termination. The new standard can be found on the Commission's website.

Application of 85% Rule

Under NDCC § 12.1.32.09.1, certain offenders are not eligible for release from confinement until eighty-five percent of the sentence imposed has been served. What happens when the offender is released, on probation, and then is revoked and resentenced?

The rule should apply to the total length of the re-sentence, not just the "additional" time. In other words, the client should be given credit for all the time he or she has already served.

For example, suppose your client was originally convicted and sentenced to ten years with

two suspended for two years of supervised probation, and that the sentence was subject to the 85% Rule. Client was eventually released on probation, and a petition to revoke his probation was filed. After a hearing, the court resentenced Client to ten years with credit for the eight he had already served. Under the rule, Client's eligibility for parole should be calculated on 85% of the ten years he was sentenced to (8.5 years, or one-half of year additional time), not based on 85% of the two years (an additional 1.7 years).

Thank you, David Ogren, Public Defender, for bringing this to everyone's attention.

Appellate Issues

We often receive questions on appellate issues, and thought it would be helpful to reiterate some common appellate questions and answers:

When does a client need to reapply for services for an appeal?

Generally, a client must reapply for services for an appeal. However, the Commission has made an exception for criminal defendants and post-conviction relief petitioners who were represented by Indigent Defense Counsel in the matter from which an appeal has been taken. These clients do not need to reapply for counsel services for the direct appeal. Also, a client whose parental rights were terminated does not need to reapply for services for an appeal from the order or judgment terminating his or her parental rights. If the client wishes to appeal, the trial counsel should file the notice of appeal and order necessary transcripts.

If trial counsel is a public defender or monthly contract attorney, trial counsel will remain the attorney on the appeal, but should close out the criminal or post-conviction case assignment on the case reporting system and open a new assignment under case type "appeal." If the attorney handled the case on an off-contract basis, or is a public defender or monthly contractor who feels, for some reason, that he or she cannot handle the appeal, the attorney

should still file the notice of appeal and order necessary transcripts so no deadlines are missed. The attorney then can submit a request to the Commission to have the appeal assigned to an appellate attorney. The appellate request form can be found on the Commission's website, at www.nd.gov/indigents/docs/appellateRequest.pdf.

What if my client in a Termination of Parental Rights case wants to appeal?

Under Rule 2.2. of the North Dakota Rules of Appellate Procedure, an appeal from an order terminating parental rights is handled on an expedited basis, and the brief must be filed with the notice of appeal. Due to the expedited nature of these appeals, the requirement that the client reapply for services for the appeal has been waived, and the appeal will be assigned to trial counsel, even if trial counsel is not a public defender or monthly contractor.

As with all appeals, the appeal is considered a separate case assignment from the underlying matter. The trial attorney should close out the TPR case assignment on the case reporting system and open a new assignment under case type "appeal."

If for some reason, trial counsel is unable to handle the appeal, counsel should, immediately upon receiving notice that the client wants to appeal, submit a conflict reassignment request to the appropriate office (the Valley City administrative office or the local public defender office) and order any necessary transcripts

Who is counsel of record on an Indigent Defense Appeal?

The trial counsel, having filed the notice of appeal, is considered the counsel of record by the appellate court, unless and until counsel moves to withdraw and the court grants the request, or the court receives timely notice of the assignment of appellate counsel. Therefore, if trial counsel does not intend to handle the appeal, it is very important to get the form "Request to Assign to Appellate Counsel" in to the Commission as soon as possible.

I've filed the appellate brief, and now my client wants to file his own, can he?

Under Rule 24 of the North Dakota Rules of Appellate Procedure, an "indigent defendant may file a statement of additional grounds for review to identify and discuss matters that the indigent defendant believes were not adequately addressed in the brief filed by counsel." The statement may not exceed twenty pages, and may be handwritten. According to Penny Miller, Clerk of the Supreme Court, there is no filing fee for the client to file this statement; however, an original and seven copies will need to be sent to the court. If the brief was e-filed, and the filing fee paid, the attorney will be able to electronically file this statement for the client.

What are my responsibilities on remand?

If the appellate court remands the matter to the trial court, the appellate counsel is responsible for doing whatever is required on the remand. If for some reason appellate counsel is not able to do what is required, appellate counsel should submit a conflict form to the Commission, requesting reassignment of the case to another attorney. If the request is granted, the appellate counsel should move to withdraw, and submit a substitution of counsel signed by appellate counsel and the new counsel.

John R. Justice Grant Program

The Governor has designated the Bank of North Dakota to administer the John R. Justice grant program. ND has been approved to receive \$100,000 in grant funds for eligible full-time prosecutors and defenders. More details about this grant are available on the Commission's website at <http://www.nd.gov/indigents/newsletter/docs/jrj-grant.pdf>.

Ethical Concerns Regarding Cooperation with Prosecution on Ineffective Assistance of Counsel Claim

On July 14, the ABA issued Formal Opinion 10-456 dealing with disclosure of information to a prosecutor when an attorney's former client brings an ineffective assistance of counsel claim. It notes that "[a]lthough an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6 (a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under [Model] Rule 1.6 (b) (5) [which is the same as N.D.R. Prof. Conduct 1.6 © (4)], a lawyer may disclose information protected by the rule only if the lawyer 'reasonably believes [it is] necessary' to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable."

Brief Bank

The Valley City office is maintaining a "Brief Bank" for attorneys either working for, or contracted with, the Commission. There just isn't much sense in having to research something from scratch if others have already done the job, and hopefully these briefs can, at the very least, provide a good starting point.

We have briefs on many topics, such as Miranda, change of venue, and various search and seizure issues.

At this time, we actively seeking briefs dealing with TPR issues, to assist those attorneys bringing appeals from the granting of a TPR, since the appeals are handled on an expedited basis pursuant to Rule 2.2 of the North Dakota Rules of Appellate Procedure.

If you would like to submit a brief for the brief bank (whether on TPR issues or any other issue you think would be of interest), please redact any confidential information. We accept briefs by email, or hard copy by mail. Thank you.

Requests for Assistance

We periodically get requests from our attorneys for assistance in finding an expert, or on finding out if someone has researched a certain issue before. When we get these requests, we send out a global email to the public defenders and contractors. We have received some pretty positive comments from attorneys who have received helpful information after making the requests. Thank you to all who provide assistance with these requests. However, we do have one request. Please do not "Reply to All" unless specifically requested to do so. We have heard comments that people get too many emails they did not solicit.

THANK YOU

We wish to thank attorneys throughout North Dakota working on their own, or with a law firm, for taking on indigent defense cases. Without these dedicated attorneys, we could not provide defense services to all who need them.

Sites to Check Out

NLADA's forensics library can be found at: [http://www.nlada.org/Defender/forensics/for lib?](http://www.nlada.org/Defender/forensics/for_lib?)

NACDL's brief bank is available to NACDL members at <http://www.nacdl.org/BriefBank.nsf/List>

CONGRATULATIONS!

Josh Rustad, Supervising Attorney in the Williston Public Defender Office, was elected District Court Judge in November's general election. He will assume his new position in January. Congratulations, and best of luck to Josh. He has been a wonderful attorney for our agency.



Next Commission Meeting

The next Commission meeting will be held on December 9, 2010 in the Valley City office. If you have any business for the Commission, please contact the Valley City office as soon as possible to get placed on the agenda. We provide notice of the meetings to the Secretary of State's office, and the meetings are open to the public.

Wishing you

Happy Holidays!



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